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Article 11

Principal and Surety - Statutory Bonds - Subrogation

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his part. It is submitted that the decision of the appellate court is consistent with the constitutional limitations which do very definitely affect the administration of relief by the courts under moratorium statutes.

OLIVER H. BASSUENER.

PRINCIPAL AND SURETY—STATUTORY BONDS—SUBROGATION.—The petitioner, a surety company, gave a bond, required by statute, for the protection of materialmen and laborers participating in the drilling of a well for the United States government. The latter's contracting officer was reguired to retain 10 per cent of the estimated amount until completion and acceptance of the work. The contractor finished the project, but he did not pay all the materialmen. The surety paid into court the full amount of its bond, several thousand dollars less than the contract price and inadequate to satisfy the claims of all materialmen. The unpaid materialmen seek the retained percentage by virtue of an alleged equity afforded by statute. The surety, by right of subrogation, lays claim as a general creditor at least to the same fund for all of it or for a pro rata share. The contractor having been adjudged a bankrupt, the government turned over the sum to the trustee to abide the order of the court. The District Court gave priority to the materialmen, which decision was affirmed by the Circuit Court of Appeals. 75 F. (2d) 377, (C.C.A. 2nd, 1935). On writ of certiorari, *held,* judgment affirmed; acquittance under the bond did not leave the surety at liberty to prove against the assets of the insolvent principal while any materialmen were unpaid. *American Surety Co. of New York* v. *Westinghouse Electric Mfg. Co.,* 56 Sup. Ct. 9 (1935).

Subrogation must be enforced with a due regard to the equitable rights of others and cannot be invoked to overthrow a superior or equal equity. *Fraser* v. *Fleming,* 190 Mich. 238, 157 N.W. 269 (1916); *Defiance Machine Works* v. *Gill,* 170 Wis. 477, 175 N.W. 940 (1920). In *New Amsterdam Casualty Co.* v. *City of Astoria,* 256 Fed. 560 (D.C. Or. 1919), the surety was denied recourse to the retained percentages because labor claims were not fully paid. To grant the surety access to the fund would result in a reduction of the protection of the bond to the extent of the surety's dividend in the assets of the debtor. *Hamill* v. *Kuchler,* 203 Wis. 414, 234 N.W. 879 (1931). Statutes making mandatory a bond to insure compensation to materialmen on public contract jobs were enacted as a substitute for the ordinary materialmen's lien on private jobs. *Wisconsin Brick Co.* v. *National Surety Co.,* 164 Wis. 585, 160 N.W. 1044 (1917); *National Surety Co.* v. *Bratnober,* 67 Wash. 601, 122 Pac. 337 (1912). It is against public policy that the instrumentalities for carrying on the government should be the subject of seizure and sale for debt. *National Fireproofing Co.* v. *Huntington,* 81 Conn. 632, 71 Atl. 911 (1909). The security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished. See *Equitable Surety Co.* v. *McMullan,* 234 U. S. 448, 34 Sup. Ct. 803, 58 L.ed. 1394 (1914). It has been held traditionally that a material alteration of a contract without the consent of the surety discharges the latter. *Woodruff* v. *Schultz,* 155 Mich. 11, 118 N.W. 579, 16 Ann. Cas. 346 (1908); *Lonergan* v. *San Antonio Loan Co.,* 101 Tex. 63, 104 S.W. 1061, 22 L.R.A. (N.S.) 364 (1907). And failure of the owner to retain percentages when required by contract on a private building project has been deemed a material alteration. *Kunz* v. *Boll,* 140 Wis. 69, 121 N.W. 601 (1909). But departures from the contract by the builder are not available to the surety as a defense against the claims of materialmen when they

can invoke a statute enacted to protect them from the mismanagement and insolvency of contractors. *Webb* v. *Freng,* 181 Wis. 39, 194 N.W. 155 (1923); *Maryland Casualty Co.* v. *Portland Construction Co.,* 71 F. (2d) 658 (C.C.A. 2nd, 1934). The rights of materialmen are unaffected by the acts of the owner and the contractor. *Standard Asphalt & Rubber Co.* v. *Texas Bldg. Co.,* 99 Kan. 567, 162 Pac. 299, L.R.A. 1917C 490 (1927); *Victoria Lumber Co.* v. *Wells,* 139 La. 500, 71 So. 781, L.R.A. 1916E 1110 (1916). However, one court has intimated that if the changes made are so great as to amount to an abandonment of the contract and the substitution of a substantially different one, so that persons supplying labor and materials would necessarily be charged with notice, a different result might be reached. *Equitable Surety Co.* v. *United States,* 234 U.S. 448, 34 Sup. Ct. 803, 58 L.ed. 1394 (1914).

The Wisconsin legislature has anticipated in some degree the probability of disputes comparable to the one in the instant case. The legislature has prescribed that the penalty of the bond on the public contract project shall not be less than the contract price. WIS. STAT. (1933) § 289.16. And in *Baumann* v. *West Allis,* 187 Wis. 506, 204 N.W. 907 (1925), the court, construing that statute, declared that if the contract omits the protective provisions they will be imputed to effectuate the legislative purpose.

LEONARD BESSMAN.

TORTS—CHARITABLE CORPORATIONS—SAFE PLACE STATUTE.—The plaintiff was a member of the ladies aid society of the defendant congregation. While attending a meeting of this group at the church the plaintiff took a folding chair from the top of a pile of chairs and was injured when the chairs toppled over and fell upon her. The plaintiff brought an action for damages for personal injuries against the congregation alleging a violation of the safe place statute [WIS. STAT. (1933) § 101.06] in that the defendant's employees had permitted the chairs to be carelessly piled inside the church building. The lower court sustained a demurrer to the complaint. On appeal, *held,* order affirmed; there was no allegation in the complaint as to any structural defect in the defendant's building. *Jaeger* v. *Evangelical Lutheran Congregation,* (Wis. 1935) 262 N.W. 585.

A religious or other charitable corporation is not responsible for the negligence of its employees. *Bachman* v. *Y. M. C. A.,* 179 Wis. 178, 191 N.W. 751, 30 A.L.R. 448 (1922); *cf.* Hansen, *Damage Liability of Charitable Corporations,* (1935) 19 MARQ. L. REV. 92. The safe place statute, *supra,* literally includes within its terms every public building. To the extent that the employees of a charitable corporation are delinquent in the care or maintenance of the structural sufficiency of the buildings occupied by such corporations the latter may be held to respond in damages to third persons. *Wilson* v. *Evangelical Lutheran Church,* 202 Wis. 111, 230 N.W. 708 (1930), where the employees of the church had permitted a stairway into the basement of the building to remain improperly lighted. But no responsibility can be imposed upon an administrative subdivision of the state even when a structural defect is permitted to exist in a building used in carrying on a public function. *Srnka* v. *School District,* 174 Wis. 38, 182 N.W. 325 (1921), where the administrative unit was a school district and where the court decided that the maintenance of schools was a public function. *Cf. Juul* v. *School District,* 168 Wis. 111, 169 N.W. 309 (1918). For a discussion of the safe place statute and structural defects with respect to the responsibility of landlords to tenants and where no charitable corporations are involved see (1935)